

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

SETH C.,

Claimant,

vs.

SAN GABRIEL POMONA REGIONAL CENTER,

Service Agency.

OAH No. 2010061364

DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on November 9, 2011, in Pomona, California. Seth C. (claimant) was present and was represented by Patricia C., his mother and authorized representative.¹ San Gabriel Pomona Regional Center (SGPRC or Service Agency) was represented by its Fair Hearing Program Manager, Daniela Martinez.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on November 9, 2011.

ISSUE

Does Claimant have a developmental disability which makes him eligible for regional center services?

///
///
///
///
///

¹ Claimant's and his mother's initials are used, in lieu of their last names, to protect their privacy.

FACTUAL FINDINGS

1. Claimant is a 9-year-old male (born July 28, 2002). He claims to be eligible for regional center services under the qualifying category of autism. (Exhibit 2.)

2. Claimant lives with his mother, and they currently do not have a home of their own. For about a year, they have been staying with varying friends and family members. (Testimony of Patricia C.)

3. Due to high anxiety and withdrawal, claimant has been receiving mental health counseling services through the Homeless CalWORKS Families Project. He has also been seeing his school psychologist since 2008, both in group and individual sessions. (Testimony of Patricia C.)

4. He is fully ambulatory, although he has some minor coordination difficulties. He can feed himself, can use the toilet independently, and can complete all self-care and personal hygiene tasks with prompts. He understands the concept of money and can sometimes identify specific coins. He has an understanding of danger, but is inconsistent in following rules to remain safe. If motivated, he can remain focused on an activity for more than 30 minutes. (Exhibit 2.)

5. Claimant responds to and appears to enjoy social interaction. He greets others and shares about himself with prompting. He displays appropriate eye contact with prompting. While he loves to interact with his peers, he has difficulty understanding and following rules and structure. Claimant has difficulty with change and will engage in outbursts if his routine is not followed. When he becomes frustrated, he usually resorts to tearing papers and books, kicking, slapping and throwing items at others. In 2010, he was suspended from school for throwing a chair at a teacher. He will also slap and hit his face when upset, leaving red marks. He is adamant about engaging in his preferred activities (video games) to the exclusion of other activities. (Exhibit 2.)

6. Claimant understands simple conversation and can communicate using simple three to five word sentences. He responds to non-verbal communication. His speech is somewhat difficult to understand, which is a source of frustration for him. He shows some signs of echolalia. (Exhibit 2.)

7. In 2006, claimant was referred to SGPRC to determine his eligibility to receive regional center services. Following a psychological evaluation by a licensed psychologist, Lisa M. Doi, Ph.D., claimant was found ineligible to receive regional center services. According to Dr. Doi:

[Regarding claimant's adaptive behavior], he demonstrates functioning in the mild deficit range in motor skills, in the borderline range in socialization abilities and in the adequate range in communication skills

and daily living skills, all based on parental report. Based on the behavioral observation, parent interview and administration of the Childhood Autism Rating Scale (CARS), [claimant] does not demonstrate symptoms or characteristics which would suggest the presence of a pervasive developmental disorder. [Claimant] presents friendly and social, demonstrates good eye contact and his use of other nonverbal communication skills appears appropriate. There was no history of echolalia or other oddities of speech. No perseverative play behaviors were noted. In addition, the existence of any preoccupations, nonfunctional routines, repetitive motor mannerisms or self-injurious behaviors were denied. Although [claimant] covers his ears in response to loud noises and does not like to touch slimy or slippery textures, these behaviors alone would not warrant a diagnosis of Autistic Disorder, Asperger's Disorder or Pervasive Developmental Disorder Not Otherwise Specified. (Exhibit 9.)

8. Claimant attends a public elementary school in El Monte. He receives special education services under the Primary Disability Category of "Autism." According to a 2009 Amendment to Individualized Education Program (IEP):

[Claimant] has been identified as an individual with exceptional needs due to Autistic-like behaviors. He was referred for a speech language assessment by the team at his IEP due to a diagnosis of Autistic-like behaviors. Speech language assessment indicates his communication skills are at or above age expectancy in the areas of articulation, vocabulary, syntax and morphology. Pragmatic skills are slightly above the low average criterion. Academic concerns are addressed by the resource specialist program [(RSP)] and anxiety and withdrawal behaviors are addressed by the counselor. (Exhibits 7 and 8.)

9(a). In November 2008, a Psycho-educational Assessment was conducted by claimant's school district. Claimant was administered the Kauffman Assessment Battery for Children – 2nd edition (KABC-II); the Test of Auditory Processing Skills – 3rd edition; the Wide Range Assessment of Visual Motor Abilities (WRAVMA); the Behavior Assessment System for Children – 2nd edition (BASC-2); the CARS; the Woodcock Johnson III Test of Academic Achievement; and the Wide Range Achievement Test – 4th edition (WRAT-4). (Exhibit 6.)

9(b). The evaluator observed:

Rapport was established almost immediately, as [claimant] appeared comfortable and was talkative with the examiner. Difficulties were noted throughout testing with his ability to maintain focus and attention to the task at hand, as he would instead look around the room or talk about another topic. At times he did not hear the examiner calling his

name to get his attention back and he needed to be called 3-4 times before he looked at the examiner. [Claimant] was observed to move slowly and process information slowly. He also demonstrated fear of certain loud sounds such as the school bell and a cell phone ring. When walking by the school bell he covered his ears twice and commented on how loud it was, even though the bell was not ringing either time. Once inside the room, he said, "What if the bell rings again and it's too loud?" Lastly, [claimant] frequently spoke in a monotone voice, though he was very verbal with the examiner. (Exhibit 6.)

9(c). On administration of the CARS, the evaluator noted:

[Both claimant's] mother and teacher report autistic-like characteristics within [claimant]. His mother indicates that [claimant] demonstrates inappropriate emotional responses to normal occurrences. For example, if he accidentally bumps someone, he becomes very upset and will cry and/or hit himself. He will make statements such as, "You hate me" to his mother despite her reassurances that it was an accident and that it is ok. Other times he will run away upset without saying anything for no apparent reason. These episodes of frustration usually occur for approximately 10 to 15 minutes before his mother is able to calm him down. His teacher also reports that he cries when he thinks she is mad at him. [Claimant] is reported to be clumsy by both his teacher and mother. When he was younger, he used to hit himself when upset.

[Claimant] has difficulty adapting to change and prefers to do activities in a set routine. For example, when getting in the car, he engages in a routine in which he first must put his backpack down, then put his seatbelt on, followed lastly by closing the door. He insists that this be done in this order. [Claimant] also has inappropriate reactions to loud noises such as the bell ringing (often covering up his ears) and to certain textures, such a cold cuts, paints, glue and Jello. He avoids these textures and sounds and becomes upset if forced to be close to these stimuli. [Claimant] also demonstrates abnormally slow and somewhat "lazy" activity levels. He becomes upset when rushed. His mother reports that he often reverses pronouns and he often quotes movies sometimes at inappropriate times. (Exhibit 6.)

9(d). The evaluator found that claimant "qualifies to receive special education services as a student with "Autistic-like behaviors according to section 3030(g) of the California Education Code." The evaluator summarized her findings as follows:

All major developmental milestones were achieved at an age appropriate rate and no major health concerns have been noted.

[Claimant] demonstrates average cognitive ability based on his performance on the KABC-II. Additionally, though his academic skills as measured by standardized achievement tests vary from below average to average, he demonstrates great difficulty working independently within the classroom and is achieving at a lower rate than 1:1 testing would suggest. [Claimant] demonstrates significant deficits in maintaining his attention. Testing results, including rating scales, teacher and parent interviews, and direct observation of [claimant], reveal that he demonstrates several autistic-like characteristics as outlined above. As such, [claimant] meets the eligibility criteria for special education services as a student with autism. [Claimant] appears to demonstrate high levels of anxiety and some withdrawal associated with this educational diagnosis. Depressive-like behaviors are also noted, though it appears that they are better associated with his high levels of anxiety and withdrawal. (Exhibit 6.)

10. In 2010, claimant was again referred to SGPRC to determine his eligibility to receive regional center services. During the intake, the staff psychologist noted that claimant's IQ and academic test results were in the average range. The psychologist further noted that an evaluation for regional center eligibility should focus on the Autism Diagnostic Observation Schedule (ADOS) and on adaptive skills, since claimant's cognitive testing did not need to be repeated. (Exhibit 1.)

11(a). On April 29, 2010, Pean Lai, Ph.D., licensed psychologist, conducted a psychological evaluation of claimant. The assessment included a review of records, an interview with claimant and his mother, observations of claimant, and administration of diagnostic tools for measuring cognitive skills and adaptive skills and for ascertaining characteristics of autism. (Exhibit 3.)

11(b). Dr. Lai observed that claimant made appropriate eye contact and accompanied her to the evaluation without apprehension. Dr. Lai further noted:

[Claimant] had poor handwriting, writing "e" in an awkward manner. He was able to state his phone number but not his address. He spoke slowly, with clear pronunciation. [Claimant] had difficulties reading and putting words in alphabetical order.

During the administration of the intellectual testing, [claimant] demonstrated excellent level of attention and participation. . . . He was socially appropriate, often initiating conversation. [Claimant] smiled in response to being praised. He appeared to try his best on all of the items. However, he appeared to have significant difficulties with tasks that required attention and focus. He appeared to get "lost" in the

middle of the task. He had to be reminded to continue with the task. . . . During the social assessment, [claimant] requested . . . puzzle pieces and engaged in an appropriate manner. He appeared to have limited imaginative abilities. He engaged in some interactive pretend play activities. [Claimant] had some insight regarding relationships. He was open about sharing his feelings and activities. [Claimant] used a range of facial expressions and gestures to convey descriptions of events and activities. He established and maintained good eye contact throughout the activities. He seemed to have typical understanding of friendships and emotions, usually seen for a child of his age. [Claimant] did not show any stereotyped behavior during [the] assessment. (Exhibit 3.)

11(c). Dr. Lai administered the ADOS, and claimant did not meet the threshold score for “autism cut-off” range. Therefore, the ADOS indicated that claimant’s behavior was inconsistent with the diagnosis of Autistic Disorder. Dr. Lai noted:

Language and Communication

[Claimant] never used stereotyped words or phrases. He gave reasonable account of a routine event. His conversation usually flowed, building on the dialogue. [Claimant] was able to use descriptive gestures.

Reciprocal and Social Interaction

[Claimant] coordinated well his eye gaze to initiate and regulate social interaction. He directed a range of appropriate facial expressions. [Claimant] showed insight into the nature of typical social relationships for a child of his age. The quality of his social overtures was appropriate. Overall, he displayed comfortable interaction with this psychologist.

Imagination

He has some abilities for creative and inventive activities.

Stereotyped Behavior and Restricted Interests

No stereotyped behavior was observed.
(Exhibit 3.)

11(d). To assess claimant’s adaptive functioning, Dr. Lai administered the Vineland Adaptive Behavior Scales, Second Edition (VABS-II). His Adaptive Behavior Composite score (83) placed him in the moderately low range of adaptive functioning. Claimant’s VABS-II scores placed him in the moderately low range in the Communication (standard score 79) domain and in the adequate range in the Daily Living (standard score 89) domain and the Socialization (standard score 87) domain. (Exhibit 3.)

11(e) Dr. Lai analyzed her findings using the Diagnostic and Statistical Manual of Mental Disorders, 4th ed., Text Revised (DSM-IV-TR), published by the American Psychiatric Association, to determine if claimant met the criteria for a DSM-IV diagnosis of autism.² According to Dr. Lai, Claimant's current behaviors do not meet the criteria for a diagnosis of autism. (Exhibit 3.)

12. On May 20, 2010, SGPRC sent a letter to claimant's mother, informing her that SGPRC had determined claimant was not eligible for regional center services. Claimant's mother requested a fair hearing. (Exhibit 4.)

13. The evidence presented at the fair hearing failed to establish that claimant suffers from Autistic Disorder.

14. The evidence presented at the fair hearing did not establish that claimant suffers from a condition similar to mental retardation or requiring treatment similar to persons with mental retardation.

LEGAL CONCLUSIONS

1. Claimant did not establish that he suffers from a developmental disability entitling him to Regional Center services. (Factual Findings 1 through 14.)

2. Throughout the applicable statutes and regulations (Welf. & Inst. Code §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. Where a claimant seeks to establish his eligibility for services, the burden is on the appealing claimant to demonstrate that the Service Agency's decision is incorrect. Claimant has not met his burden of proof in this case.

3. In order to be eligible for regional center services, a claimant must have a qualifying developmental disability. As applicable to this case, Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

[A] disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual, and includes mental retardation, cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other

² The Administrative Law Judge takes official notice of the DSM-IV-TR as a highly respected and generally accepted tool for diagnosing mental and developmental disorders.

handicapping conditions that are solely physical in nature.

4. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that he has a “substantial disability.” In assessing what constitutes a “substantial disability” within the meaning of section 4512, the following provisions are helpful:

California Code of Regulations, title 17, section 54001 states, in pertinent part:

(a) “Substantial disability” means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

In California Code of Regulations, title 17, section 54002, the term “cognitive” is defined as:

[T]he ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly, and to profit from experience.

5(a). In addition to proving a “substantial disability,” a claimant must show that his disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: mental retardation, epilepsy, autism and cerebral palsy. The fifth and last category of eligibility is listed as “Disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.” (Welf. & Inst. Code, § 4512, subd. (a).) This category is not further defined by statute or regulation.

5(b). Whereas the first four categories of eligibility are very specific, the disabling conditions under this residual fifth category are intentionally broad to encompass unspecified conditions and disorders. However, this broad language is not intended to be a catchall,

requiring unlimited access for all persons with some form of learning or behavioral disability. There are many persons with sub-average functioning and impaired adaptive behavior; under the Lanterman Act, the Service Agency does not have a duty to serve all of them.

5(c). While the Legislature did not define the fifth category, it did require that the qualifying condition be “closely related” (Welf. & Inst. Code, § 4512) or “similar” (Cal. Code. Regs., tit. 17, § 54000) to mental retardation or “require treatment similar to that required for mentally retarded individuals.” (Welf. & Inst. Code, § 4512.) The definitive characteristics of mental retardation include a significant degree of cognitive and adaptive deficits. Thus, to be “closely related” or “similar” to mental retardation, there must be a manifestation of cognitive and/or adaptive deficits which render that individual’s disability like that of a person with mental retardation. However, this does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to mental retardation (e.g., reliance on I.Q. scores). If this were so, the fifth category would be redundant. Eligibility under this category requires an analysis of the quality of a claimant’s cognitive and adaptive functioning and a determination of whether the effect on his/her performance renders him/her like a person with mental retardation. Furthermore, determining whether a claimant’s condition “requires treatment similar to that required for mentally retarded individuals” is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational training or living skills training). The criterion is not whether someone would benefit. Rather, it is whether someone’s condition *requires* such treatment.

6. In order to establish eligibility, a claimant’s substantial disability must not be solely caused by an excluded condition. The statutory and regulatory definitions of “developmental disability” (Welf. & Inst. Code, § 4512 and Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are *solely* physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are *solely* psychiatric disorders or *solely* learning disabilities. Therefore, a person with a “dual diagnosis,” that is, a developmental disability coupled with either a psychiatric disorder, a physical disorder, or a learning disability, could still be eligible for services. However, someone whose conditions originate from just the excluded categories (psychiatric disorder, physical disorder, or learning disability, alone or in some combination), and who does *not* have a developmental disability would not be eligible.

7. Although claimant maintains that he is eligible for regional center services, he currently does not have any of the qualifying diagnoses.

///
///
///
///
///

///

8. The DSM-IV-TR discusses autism in the section entitled “Pervasive Developmental Disorders.” (DSM-IV-TR, pp. 69 - 84.) The five “Pervasive Developmental Disorders” identified in the DSM-IV-TR are Autistic Disorder, Rett’s Disorder, Childhood Disintegrative Disorder, Asperger’s Disorder, and PDD-NOS. The DSM-IV- TR, section 299.00 states:

The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and markedly restricted repertoire of activity and interests. Manifestations of the disorder vary greatly depending on the developmental level and chronological age of the individual. Autistic Disorder is sometimes referred to as *early infantile autism*, *childhood autism*, or *Kanner’s autism*. (Emphasis in original.)

(*Id.* at p. 70.)

9. The DSM-IV-TR lists criteria which must be met to provide a specific diagnosis of an Autistic Disorder, as follows:

- A. A total of six (or more) items from (1), (2) and (3), with at least two from (1), and one each from (2) and (3):
 - (1) qualitative impairment in social interaction, as manifested by at least two of the following:
 - (a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction
 - (b) failure to develop peer relationships appropriate to developmental level
 - (c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest)
 - (d) lack of social or emotional reciprocity
 - (2) qualitative impairments in communication as manifested by at least one of the following:
 - (a) delay in, or total lack of, the development of

spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gestures or mime)

- (b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others
 - (c) stereotyped and repetitive use of language or idiosyncratic language
 - (d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level
- (3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:
- (a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus.
 - (b) apparently inflexible adherence to specific, nonfunctional routines or rituals.
 - (c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)
 - (d) persistent preoccupation with parts of objects

B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in communication, or (3) symbolic or imaginative play.

C. The disturbance causes clinically significant impairment in social, occupational, or other important areas of functioning.

(*Id.* at p. 75.)

10. In this case, no psychologist has diagnosed claimant with Autistic Disorder, and there is nothing in the evidence to suggest that claimant was incorrectly diagnosed. According to the DSM-IV-TR, specific clinical criteria must be evident to diagnose Autistic

Disorder. While Claimant does manifest some mild impairment in his communication, no psychologist specifically found that he satisfied the required number of elements within the autism criteria of the DSM-IV-TR to diagnose him with Autistic Disorder. Consequently, Claimant has not established that he is eligible for regional center services under the diagnosis of autism.

11. Although claimant does demonstrate some mild deficits in adaptive skills, the evidence did not demonstrate that he presents as a person suffering from a condition similar to Mental Retardation. Moreover, the evidence did not establish that claimant requires treatment similar to that required for mentally retarded individuals. Based on the foregoing, claimant has not met his burden of proof that he falls under the fifth category of eligibility.

12. The weight of the evidence did not support a finding that claimant is eligible to receive regional center services.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Claimant's appeal of the Service Agency's determination that he is not eligible for regional center services is denied.

DATED: November 21, 2011

JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.